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10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA  
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13 UNITED STATES OF AMERICA, ) 3:05-cr-00098-HDM  
14 Plaintiff, ) 3:10-cv-00531-HDM  
15 vs. ) ORDER  
16 JOHNATHON ROBERTS, )  
17 Defendant. )  
18

19 Before the court is the defendant's motion to reopen his  
20 habeas proceedings (#504). Defendant has also moved for discovery  
21 in connection with the motion (#503). The government has opposed  
22 (#507), and defendant has replied (#511).

23 On August 25, 2010, the defendant filed a petition for relief  
24 under 28 U.S.C. § 2255. Following responses from the government,  
25 replies by the defendant, several supplements, and an evidentiary  
26 hearing, the court denied defendant's motion on July 9, 2012.  
27 Defendant appealed the court's order, and on January 28, 2013, the  
28 Ninth Circuit denied defendant a certificate of appealability.

1 On July 11, 2013, defendant filed a Federal Rule of Civil  
2 Procedure 60(b) motion to vacate the court's order denying his  
3 § 2255 petition. The court denied that motion on August 7, 2013.  
4 Defendant appealed the court's order, and on October 30, 2013, the  
5 Ninth Circuit denied defendant a certificate of appealability.

6 On or about July 23, 2013, defendant filed a petition for writ  
7 of certiorari with respect to the court's order denying his § 2255  
8 petition. The Supreme Court denied the petition on October 7,  
9 2013.

10 On February 10, 2014, defendant filed the instant motion  
11 seeking to reopen the habeas proceeding on the grounds of newly  
12 discovered claims of ineffective assistance of counsel and other  
13 alleged constitutional violations.

14 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to  
15 vacate, set aside, or correct his sentence if: (1) the sentence was  
16 imposed in violation of the Constitution or laws of the United  
17 States; (2) the court was without jurisdiction to impose the  
18 sentence; (3) the sentence was in excess of the maximum authorized  
19 by law; or (4) the sentence is otherwise subject to collateral  
20 attack. *Id.* § 2255(a). Where the defendant has previously filed a  
21 § 2255 petition, a second or successive § 2255 petition cannot be  
22 considered by the district court absent a certificate from the  
23 Court of Appeals authorizing it to do so. 28 U.S.C. § 2255(h); *id.*  
24 § 2244; *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir.  
25 2011). A defendant "may not rely on Rule 60(b) to raise a new  
26 claim in federal habeas proceedings that would otherwise be barred  
27 as second or successive under" § 2255. *United States v.*  
28 *Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (citing *Gonzalez v.*

1 Crosby, 545 U.S. 524, 531).<sup>1</sup>

2 Defendant claims that on June 13, 2013, he learned that his  
3 former attorney, Loren Graham, had failed to advise him of a plea  
4 agreement offered by the government before trial in this matter.  
5 Defendant contends that the alleged failure to convey the plea  
6 offer was ineffective assistance of counsel and that the failure to  
7 include the offer in the file when forwarding it to the attorney  
8 who replaced Graham violated various of defendant's constitutional  
9 rights.

10 The government responds that defendant's motion to reopen is  
11 in essence a second or successive § 2255 petition, and that because  
12 the Court of Appeals has not authorized the filing of any such  
13 motion, the petition must be dismissed for want of jurisdiction.  
14 The government further argues that defendant's motion is squarely  
15 foreclosed by the Ninth Circuit's decision in *United States v.*  
16 *Buenrostro*, 638 F.3d 720 (9th Cir. 2011).

17 In his reply, defendant asks the court to construe his claims  
18 under whatever legal framework would give the court jurisdiction.  
19 He also suggests that his motion is not second or successive  
20 because he raised the newly discovered claim in a letter to the  
21 Supreme Court before filing his petition for writ of certiorari.

22 In *United States v. Buenrostro*, the defendant moved to reopen  
23 his § 2255 proceeding on the basis of a newly discovered  
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25 <sup>1</sup>While a "defect in the integrity of the federal habeas proceedings,  
26 such as fraud on the court, might justify reopening § 2255 proceedings under  
27 Rule 60(b)," *Buenrostro*, 638 F.3d at 722 (citing *Gonzalez*, 545 U.S. at 532  
28 & n.5) (internal punctuation omitted), defendant has not in this motion  
asserted any such claim. Moreover, defendant raised a claim of defect in  
the integrity of the proceedings in his first Rule 60(b) motion, and such  
claim was rejected by the court.

1 ineffective assistance of counsel claim. *Buenrostro*, 638 F.3d at  
2 721. Specifically, the defendant asserted that his attorney had  
3 not conveyed a plea offer from the government before the defendant  
4 went to trial - the same claim made here. *Id.* The defendant did  
5 not learn of the proposed plea offer until after his initial § 2255  
6 proceedings had concluded. See *id.*

7       The Ninth Circuit held that because the defendant's new claim  
8 was cognizable under § 2255 and was "wholly independent of the  
9 claims adjudicated in his first § 2255 proceeding," the second or  
10 successive bar applied to bar the defendant's claim. The court  
11 held this despite the fact that the defendant had not discovered  
12 the new claim until his initial habeas proceedings had concluded.  
13 The relevant question for the second or successive bar was not  
14 whether the defendant knew of the claim during the first  
15 proceedings but whether it was ripe at that time. The Ninth  
16 Circuit concluded that the defendant's claim that his attorney had  
17 failed to convey a plea offer before trial was ripe at the time  
18 defendant filed his first § 2255 petition. The court further  
19 concluded that it could not authorize the filing of the second or  
20 successive petition because the defendant's claim neither bore on  
21 his innocence of the underlying crime nor turned on a new rule of  
22 constitutional law.

23       Defendant's request to reopen the habeas proceedings is  
24 foreclosed by the second or successive bar and the Ninth Circuit's  
25 decision in *Buenrostro*. That defendant may have advised the  
26 Supreme Court of his newly discovered claim before the Court denied  
27 his petition for writ of certiorari is irrelevant. Defendant cites  
28 no authority for the proposition that raising an issue with the

1 Supreme Court is sufficient to raise the claim in the initial  
2 habeas proceedings. This is particularly true in this case, where  
3 defendant in fact filed a Rule 60(b) motion with this court on July  
4 8, 2013 - several weeks after he asserts he learned of the alleged  
5 unconveyed plea offer - and the Rule 60(b) motion contained nothing  
6 indicating or even suggesting that he might have such a claim.  
7 Defendant's remaining attempts to distinguish *Buenrostro* are  
8 unpersuasive.

9 Defendant asks the court to construe his claims in whatever  
10 framework would allow him relief. However, a "prisoner may not  
11 circumvent valid congressional limitations on collateral attacks by  
12 asserting that those very limitations create a gap in the  
13 postconviction remedies that must be filled by the common law  
14 writs." *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1080 (9th  
15 Cir. 2001).

16 Defendant also argues that he should be able to proceed under  
17 28 U.S.C. § 2241. Section 2255 provides an escape hatch allowing a  
18 prisoner to file a petition for habeas corpus under § 2241 if §  
19 2255 "is inadequate or ineffective to test the legality of his  
20 detention." 28 U.S.C. § 2255(e). However, a § 2241 petition must  
21 be filed in the court in the jurisdiction where the defendant is  
22 being held. See *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir.  
23 2000) ("[A] habeas petition filed pursuant to § 2241 must be heard  
24 in the custodial court."). Defendant is not in custody in the  
25 District of Nevada, so this is not the custodial court. Moreover,  
26 defendant has not shown he is qualified for the escape hatch.  
27 Section 2255's remedy is not inadequate or ineffective merely  
28 because the defendant cannot file a second or successive petition.

1 *Loretsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000). To meet the  
2 "escape hatch criteria" the defendant must "make[] a claim of  
3 actual innocence," and have "not had an unobstructed procedural  
4 shot at presenting that claim." *Harrison v. Ollison*, 519 F.3d 952,  
5 959 (9th Cir. 2008). "To establish actual innocence, petitioner  
6 must demonstrate that, in light of all the evidence, it is more  
7 likely than not that no reasonable juror would have convicted him."  
8 *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (citing  
9 *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

10 Defendant asserts that he is claiming actual innocence.  
11 However, nothing in the briefs demonstrates that defendant is  
12 actually innocent. Rather, defendant argues that he would not have  
13 been convicted of certain counts but for the alleged ineffective  
14 assistance of counsel. But this is not actual innocence.  
15 Accordingly, defendant does not qualify for § 2255's escape hatch.

16 When the defendant's claim is denied on procedural grounds, a  
17 certificate of appealability should issue if the petitioner shows:  
18 (1) "that jurists of reasons would find it debatable whether the  
19 petition states a valid claim of the denial of a constitutional  
20 right"; and (2) "that jurists of reason would find it debatable  
21 whether the district court was correct in its procedural ruling."  
22 *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). The court has  
23 considered the arguments raised by defendant with respect to  
24 whether they meet the standard for issuance of a certificate of  
25 appealability and concludes that they do not. Accordingly, the  
26 court will not grant defendant a certificate of appealability.

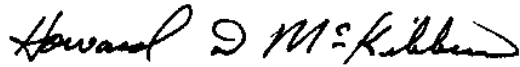
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1 In accordance with the foregoing, the defendant's motion to  
2 reopen the habeas proceedings (#504) is **DENIED**. The motion for  
3 discovery (#503) is also **DENIED**.

4 IT IS SO ORDERED.

5 DATED: This 16th day of May, 2014.

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8 UNITED STATES DISTRICT JUDGE  
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